IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
October 24, 2006 Session

STATE OF TENNESSEE v. LAURA STARKEY AND TRAETON MCCOY

Direct Appeal from the Circuit Court for Warren County
No. F-9863 Larry B. Stanley, Jr., Judge

No. M2005-02896-CCA-R3-CD - Filed May 2, 2007

A Warren County Circuit Court jury convicted the appellants, Laura Starkey and Traeton McCoy, of knowingly keeping or maintaining a dwelling that is used for keeping or selling controlled substances and convicted McCoy of manufacturing methamphetamine. The trial court sentenced Starkey to two years to be served as sixty-five days in jail and the remainder on probation and sentenced McCoy to an effective four years in the Department of Correction. In this appeal, the appellants argue that the evidence is insufficient to support their convictions. In addition, Starkey contends that the trial court erred by denying her request for full probation, and McCoy claims that the trial court erred by denying his request for alternative sentencing. Upon review of the record and the parties' briefs, we reverse Starkey's conviction and dismiss that charge. McCoy's conviction for knowingly keeping or maintaining a dwelling that is used for keeping or selling controlled substances is also reversed because the trial court gave erroneous jury instructions, and the case is remanded to the trial court for a new trial. McCoy's conviction and sentence for manufacturing methamphetamine are affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court are Reversed in Part, Affirmed in Part, and Case Remanded.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID H. WELLES and J.C. MCLIN, JJ., joined.

Robert S. Peters, Winchester, Tennessee, for the appellants, Laura Starkey and Traeton McCoy.

Robert E. Cooper, Jr., Attorney General and Reporter; Brent C. Cherry, Assistant Attorney General; Clement Dale Potter, District Attorney General; and Thomas Miner, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

Sergeant Daniel Chisam of the Warren County Sheriff's Department testified that he is a member of the Southeast Methamphetamine Task Force and became certified by the Drug Enforcement Administration (DEA) in 2000 to dismantle methamphetamine laboratories. On the evening of March 13, 2004, Sergeant Chisam and two other officers went to a residence at 656 Bridge Builders Road in Warren County. As Sergeant Chisam's patrol car approached the residence, he saw appellant Treaton McCoy, whom he had met previously, standing near the driveway. By the time Sergeant Chisam's patrol car pulled up to the home, McCoy had already gone inside. Sergeant Chisam heard glass breaking in the house and yelled for McCoy to come outside. McCoy came out, and Sergeant Chisam told McCoy why he was there. Sergeant Chisam "could smell an odor that's consistent with the manufacture of methamphetamine" and asked to search the house.

Sergeant Chisam testified that McCoy consented to a search of the home and that the three officers conducted a thorough search of the residence. Inside, they found a broken jar in the kitchen sink, a liquid in the sink, a white residue and numerous glass Mason jars around the sink, a glass dish with a white residue on the bottom, Mason jars containing a white residue, acetone in a kitchen cabinet, striker plates that had been soaked in acetone, and tubing in the kitchen trash can. The officers also found a Yoo-hoo drink bottle, which Sergeant Chisam believed was the "cooking vessel." He stated that Yoo-hoo bottles are often used to cook methamphetamine because the bottles are made of thick glass that can withstand heat. He said the Yoo-hoo bottle contained a small amount of liquid and had dark red "cook" around the bottle's lid. The officers also found red phosphorus and methamphetamine in a used coffee filter and two glass pipes used to smoke methamphetamine. Sergeant Chisam explained the process for manufacturing methamphetamine and described how the items recovered from the home could have been used to make the drug.

Sergeant Chisam testified that a burn pile was outside the home; that the pile contained books of matches, two bottles of Heet, and plastic gloves; and that smoke was rising from the pile when the officers arrived at the home. The officers also found more tubing in a tool box. Sergeant Chisam stated that McCoy's hands were stained with chemicals and that two of McCoy's fingers were very dry, which could have been caused by McCoy's handling acetone. A man named Clint Judkins was also present at the home, but the officers did not arrest him. Sergeant Chisam telephoned appellant Laura Starkey at a doctor's office where she worked, and she came to the residence. Sergeant Chisam said photographs taken inside the home showed women's boots and clothing. When asked how he knew Laura Starkey lived in the home, Sergeant Chisam replied, "I've known her for quite a while and I've known Traeton for a while."

Sergeant Chisam arrested McCoy, took him to the police department, advised him of his rights, and interviewed him. McCoy told the police that someone had manufactured methamphetamine in the home that day and that McCoy had helped the person make methamphetamine by stripping matches. According to McCoy, he had allowed the person to make methamphetamine in the home for the past six months in exchange for a small amount of methamphetamine. McCoy also said he would test positive for methamphetamine. Sergeant Chisam testified that he interviewed Starkey. She told him that the glass pipes belonged to her; that she lived in the house; and that every evening before she left work, she telephoned McCoy to make sure it was

all right for her to return home. Sergeant Chisam stated that much of the evidence collected from the home had to be destroyed for safety reasons but that he sent some of the evidence to the Tennessee Bureau of Investigation (TBI) for testing.

On cross-examination, Sergeant Chisam testified that he went to the home because he had information McCoy was making methamphetamine there. He acknowledged that McCoy was very cooperative, that the officers did not find any pseudoephedrine pills needed to make methamphetamine, and that the white residue found in the home did not test positive for methamphetamine. He stated, however, that the coffee filter contained red phosphorus and tested positive for methamphetamine. He stated that the coffee filter was dry and that he did not know how long it had been there but that the striker plates were wet. He denied telling Starkey, "[D]on't worry, you haven't done anything wrong." He stated that he did not know if Starkey had an ownership interest in the home but that he knew she lived there because she told him she had lived there for two years. He acknowledged that he did not arrest Starkey until months later.

Deputy Kevin Murphy testified that he went with Sergeant Chisam to the home at 656 Bridge Builders Road on March 13. Treaton McCoy gave Sergeant Chisam consent to search the residence, and Deputy Murphy photographed the scene. Deputy Murphy stated that the officers saw enough items in the home to know that a methamphetamine laboratory was present, and he believed that methamphetamine had been manufactured in the home very recently. He stated that the odor of methamphetamine was in the house, that the officers found red phosphorus, and that the phosphorus appeared to have been used in a "cook." The officers also found a Yoo-hoo bottle with stains around the lid and found burned match stems in a burn pile. Deputy Murphy was also present during McCoy's and Starkey's interviews. He said that Starkey "didn't come right out and say Traeton McCoy is cooking dope at my house" but that Starkey said, "I have to call Traeton and see if it's ok before I come home." Deputy Murphy said that Starkey's last statement let the officers know Starkey knew what was going on in the house.

On cross-examination, Deputy Murphy acknowledged that Judkins was present at the home but was never charged with a crime and that Starkey was not charged with a crime at that time. He acknowledged that a person might call home before they left work for any number of reasons and that nothing forensically connected Starkey to the items found in the house. He stated that the officers did not find any "finished methamphetamine" or pseudoephedrine. However, he believed that some of the Mason jars contained pseudoephedrine residue.

Robert Mark Young, a forensic scientist with the TBI Crime Laboratory, testified that Sergeant Chisam sent the following items to the lab for testing: a plastic screw-top bottle containing a scoop and a black tar-like substance; a glass vial containing a liquid residue; a glass pipe containing residue; a yellow liquid; and a white coffee filter containing a red substance. Regarding the first three items, he stated that there were insufficient amounts of the samples for analysis. Regarding the yellow liquid, no controlled substances were detected. Analysis of the coffee filter revealed that the filter tested positive for methamphetamine. He stated that he believed the red substance in the filter was red phosphorus. On cross-examination, he acknowledged that only a

"trace" amount of methamphetamine was detected in the coffee filter. Although Laura Starkey had been charged with facilitation of manufacturing methamphetamine and keeping or maintaining a dwelling that is used for keeping or selling controlled substances, the jury convicted her only of the latter offense. The jury convicted Traeton McCoy of manufacturing methamphetamine and keeping or maintaining a dwelling that is used for keeping or selling controlled substances.

II. Analysis

A. Insufficient Evidence - Convictions for Keeping or Maintaining a Dwelling Used for Keeping or Selling Controlled Substances

Both of the appellants argue that the evidence is insufficient to support their convictions for keeping or maintaining a dwelling that is used for keeping or selling controlled substances. The appellants contend that Tennessee Code Annotated section 53-11-401 applies only to persons, such as pharmacists, who manufacture, distribute, or dispense controlled substances pursuant to a state licencing authority or some other regulatory agency. Starkey also contends that the evidence is insufficient to support her conviction because, although she lived in the home with McCoy and may have used methamphetamine there, her activities did not sufficiently show that she did "keep or maintain" the home as required by the statute. The State contends that the statute applies to all persons and that the appellants' living in the home is sufficient evidence that they did "keep or maintain" it. We conclude that the statute applies to all persons but that the evidence is insufficient to show Starkey kept or maintained the dwelling at 656 Bridge Builders Road. In addition, because the trial court improperly instructed the jury about the crime, McCoy's conviction is also reversed, and the case is remanded for a new trial as to McCoy.

The crime at issue is codified in Tennessee Code Annotated section 53-11-401(a)(5) and is part of the Tennessee Drug Control Act of 1989. See Tenn. Code Ann. § 39-17-401. Tennessee Code Annotated section 53-11-401 sets out some of the crimes and penalties for violations of the Act and provides, in pertinent part, as follows:

> (a) It is unlawful for any person:
>
> (1) Who is subject to part 3 of this chapter, to distribute or dispense a controlled substance in violation of § 53-11-308 or to distribute or dispense any controlled substance for any purpose other than those authorized by and consistent with such person's professional or occupational licensure or registration law, or to distribute or dispense any controlled substance in a manner prohibited by such person's professional or occupational licensure or registration law;
>
> (2) Who is a registrant, to manufacture a controlled substance not authorized by such registrant's registration, or to distribute or

> dispense a controlled substance not authorized by such registrant's registration to another registrant or other authorized person;
>
> . . .; or
>
> (5) Knowingly to keep or maintain any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft or other structure or place that is resorted to by persons using controlled substances in violation of parts 3 and 4 of this chapter or title 39, chapter 17, part 4, for the purpose of using these substances, or that is used for keeping or selling them in violation of parts 3 and 4 of this chapter or title 39, chapter 17, part 4.

In Moore v. State, 568 S.W.2d 632 (Tenn. Crim. App. 1978), the two defendants were convicted of knowingly keeping or maintaining a building that is used for keeping or selling controlled substances after police officers repeatedly purchased marijuana from the defendants at a tailoring shop. As the appellants in the present case argue, the defendants in Moore claimed that Tennessee Code Annotated section 53-11-401(a)(5), which was then codified as Tennessee Code Annotated section 52-1435(a)(5), applied only to registrants. Id. at 634. However, this court disagreed, noting first that section -401(a)(5) makes it unlawful for "any person," in contrast with sections -401(a)(1) and (a)(2), which specifically apply only to persons subject to the registration provisions. Id. Thus, our court concluded that "[u]nder the clear language of the statute, all persons are subject to prosecution for the activity proscribed under [Tennessee Code Annotated section 53-11-401(a)(5)]." Id. The appellants in this case contend that the reasoning in Moore is "less than convincing" and that the statute "should not apply to the ordinary drug defendant." However, as this court concluded in Moore, the plain language of the statute demonstrates that the legislature did not intend to limit application of section -401(a)(5) to registrants and that "any person" can be convicted of the crime.

We will now turn to Starkey's argument that she did not "keep or maintain" the home. When an appellant challenges the sufficiency of the convicting evidence, the standard for review by an appellate court is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); Tenn. R. App. P. 13(e). The State is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions concerning the credibility of witnesses and the weight and value to be afforded the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact. State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). This court will not reweigh or reevaluate the evidence, nor will this court substitute its inferences drawn from the circumstantial evidence for those inferences drawn by the jury. Id. Because a jury conviction removes the presumption of innocence with which a defendant is initially cloaked at trial and replaces it on appeal with one of

guilt, a convicted defendant has the burden of demonstrating to this court that the evidence is insufficient. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

Criminal code provisions "shall be construed according to the fair import of their terms, including reference to judicial decisions and common law interpretations, to promote justice, and effect the objectives of the criminal code." Tenn. Code Ann. § 39-11-104. "This Court's role in construing statutes is to give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope." See State v. Butler, 980 S.W.2d 359, 362 (Tenn. 1998). Moreover, we "determine legislative intent from the natural and ordinary meaning of the statutory language within the context of the entire statute without any forced or subtle construction that would extend or limit the statute's meaning." State v. Flemming, 19 S.W.3d 195, 197 (Tenn. 2000). Although "keep or maintain" is not defined in our code, the definition of "keep" is "to watch over and defend," "to have the care of," or "to cause to remain in a given place, situation, or condition." Webster's Third New International Dictionary 1235 (1993). "Maintain" is defined as "preserve from failure or decline" or "carry on." Id. at 1362.

Starkey argues that she had no ownership interest in the house and that the State was required to prove more than residency. Under the plain language of Tennessee Code Annotated section 53-11-401(a)(5), ownership of the property is not required. Nevertheless, the State must show that the person continuously exercised some authority or control over the property for an appreciable period of time. See Griffin v. Berghuis, 298 F. Supp. 2d 663, 669 (E.D. Mich. 2004); People v. Griffin, 597 N.W.2d 176, 181 (Mich. Ct. App. 1999); see also State v. Mitchell, 442 S.E.2d 24, 30-31 (N.C. 1994). While proof of residency is a significant factor to consider, that factor alone is not dispositive. Other factors that may be considered include whether the person owned or leased the property; is the only permanent resident in the home; paid any rent, taxes, or utilities; took part in the home's maintenance or upkeep; or provided furnishings for the home. See United States v. Clavis, 956 F.2d 1079, 1090-91 (11th Cir. 1992); State v. Bowens, 535 S.E.2d 870, 873 (N.C. 2000); Ashley v. State, 925 So. 2d 1117, 1122-23 (Fla. Dist. Ct. App. 2006) (Sawaya, J., dissenting).

The proof in this case established that Starkey lived in the home with McCoy. However, the State presented no evidence that she was the owner or lessee of the house; paid any rent, utilities, or taxes; took part in the home's maintenance or upkeep; had furnishings in the home; or had any general control over the premises. Although Starkey knew that methamphetamine was being made in the home and may have used the drug, we conclude that under the totality of the circumstances, the State's evidence was inadequate to show that she did "keep or maintain" the home as required by the statute. Therefore, her conviction must be reversed.[1]

[1]Ironically, Starkey states in her appellate brief that in addition to living in the house with McCoy, she "perhaps cooked dinner, made the beds, and swept the floors." If the State had shown that Starkey was involved in such upkeep of the home, our holding regarding her conviction likely would be different. However, statements contained in briefs are not evidence. State v. Dykes, 803 S.W.2d 250, 255 (Tenn. Crim. App. 1990).

The State also failed to present any proof that McCoy owned or leased the property; paid rent, taxes, or utilities; took part in the home's maintenance or upkeep; or provided furnishings for the home. However, McCoy told officers that he had been allowing another person to make methamphetamine in the house for the past six months. Moreover, Starkey would telephone McCoy in the evenings to ensure that it was all right for her to come home. Finally, when Sergeant Chisam asked to search the home, McCoy gave permission for the search, never indicating to the officers that he did not have such authority. This evidence is sufficient to show that McCoy continuously exercised some authority over the house and, therefore, did "keep or maintain" the dwelling. See United States v. Morgan, 117 F.3d 849, 857 (5th Cir. 1997) (noting that evidence of "supervisory control" over a property is a factor to consider in determining whether a defendant "maintained" the property).

That said, we have no choice but to reverse McCoy's conviction for this offense. A careful reading of Tennessee Code Annotated section 53-11-401(a)(5) reveals that a person commits this crime, in pertinent part, by (1) knowingly keeping or maintaining any home "that is resorted to by persons using controlled substances . . . for the purpose of using these substances" or by (2) knowingly keeping or maintaining any home "that is used for keeping or selling [controlled substances]." Our review of the trial transcript reveals that the trial court instructed the jury as follows:

> Now the definition of maintaining a dwelling for the manufacture, sale, or use of drugs. For you to find the defendant guilty of this offense, the State must have proven beyond a reasonable doubt the existence of the following two essential elements: Number 1, that the defendant maintained a dwelling, building, or some other structure or place which is, (a) resorted to by persons using controlled substances for the purpose of using these substances or used for keeping, manufacturing, or selling controlled substances and; number 2, that the defendant acted knowingly.
>
> . . . .
>
> In Count 2, both parties are charged with exactly the same thing and it will be as follows: If you have a reasonable doubt as to the defendants' guilt of maintaining a dwelling for the manufacture, sale, or use of drugs, then your verdict must be not guilty as to Count 2 and I will go over that again with you in a minute with the verdict form and make it clearer.

In these instructions, the trial court repeatedly used the word "manufacture," stating that the jury could convict the appellants if the jury determined that the appellants knowingly kept or maintained the home and that the home was used to manufacture controlled substances. However, "manufacture," which is specifically defined in Tennessee Code Annotated section 39-17-402(15),

does not appear anywhere in Tennessee Code Annotated section 53-11-401(a)(5). See State v. Teel, 793 S.W.2d 236, 249 (Tenn. 1990) (providing that a defendant has a "constitutional right to a correct and complete charge of the law"). Moreover, given the facts presented at trial and the trial court's instructions, we believe the jury could have found McCoy guilty of this crime by concluding that he did knowingly keep or maintain a dwelling that is used to manufacture controlled substances. Therefore, the trial court's instructions were plain error, and McCoy's conviction under Tennessee Code Annotated section 53-11-401(a)(5) must be reversed. See Tenn. R. Crim. P. 52(b); State v. Adkisson, 899 S.W.2d 626, 639 (Tenn. Crim. App. 1994). The case is remanded to the trial court for a new trial as to McCoy's conviction for this offense.

B. Sufficiency - McCoy's Conviction for Manufacturing a Controlled Substance

McCoy contends that the evidence is insufficient to support his conviction for manufacturing methamphetamine and, at most, establishes an attempt to manufacture methamphetamine. In support of his argument, he cites State v. David Long, No. W2003-02522-CCA-R3-CD, 2005 Tenn. Crim. App. LEXIS 199 (Jackson, Mar. 4, 2005), in which a panel of this court reversed a defendant's conviction for manufacturing methamphetamine. In Long, the police stopped a vehicle being driven by the defendant and found various chemicals and materials used in the production of methamphetamine and instructions for making the drug. Id. at **4-5. In reversing the defendant's conviction, this court concluded that although the defendant possessed many materials used to manufacture methamphetamine, "the record fails to establish any evidence of production, compounding, converting, processing, or extraction of any controlled substance." Id. at *18.

The facts in this case are significantly different from the facts in Long. In the present case, the officers smelled a chemical odor consistent with the manufacture of methamphetamine. Upon searching the residence, they found chemicals and equipment used to make the drug. A Yoo-hoo bottle contained "cook" around the lid, and a coffee filter contained red phosphorus. Chemical analysis of the coffee filter showed that the filter contained a trace amount of methamphetamine. The evidence overwhelmingly established that methamphetamine had been manufactured in the home and is sufficient to support McCoy's conviction for that offense.

C. McCoy's Sentencing

Finally, McCoy contends that the trial court erred by denying his request for an alternative sentence. The State argues that the trial court properly ordered the appellant to serve his entire sentence in confinement. We agree with the State.

At the appellants' sentencing hearing, Jerry R. Johns, a probation officer who prepared the appellants' presentence reports, testified that he had been a probation officer since 1992 and had worked in the Thirty-First Judicial District for about three years. He stated that he currently was supervising ninety-one probationers and that at least eight-five percent of them were on probation for methamphetamine-related crimes. He acknowledged that other probation officers in the district were also supervising probationers convicted mostly of methamphetamine-related crimes and that

the use of methamphetamine in the community was "a major concern" and frequently in the news. On cross-examination, he testified that he was recommending McCoy receive an alternative sentence involving supervision even though McCoy had some prior convictions and a pending charge for felony theft.

According to McCoy's presentence report, the then thirty-eight-year-old appellant was divorced and had two young sons. In the report, he stated that he had worked as a farmer with his father for the past two years. Prior to farming, the appellant worked as a truck driver and a vinyl siding installer. The report shows that he is a high school graduate, and the appellant claimed in the report that he was attending community college at the time of his arrest. The report shows that the appellant has numerous prior misdemeanor convictions, including convictions for vandalism, reckless endangerment, unlawful possession of drug paraphernalia, possession of marijuana for resale, driving while intoxicated, leaving the scene of an accident, disorderly conduct, and driving without a license.

The trial court noted that the appellant was a Range I offender and, therefore, facing a three- to six-year sentence for manufacturing methamphetamine, a Class C felony. See Tenn. Code Ann. § 40-35-112(a)(3). The trial court also noted that the appellant had prior misdemeanor convictions and stated that the manufacture of methamphetamine "is and continues to be one of the most difficult problems we face in this community." The court concluded that the appellant should receive a four-year sentence. Regarding the manner of service, the trial court held that the appellant's prior criminal record, his potential for rehabilitation, and the need to deter others from similar behavior warranted the appellant's serving his entire sentence in confinement.

Appellate review of the length, range or manner of service of a sentence is de novo. See Tenn. Code Ann. § 40-35-401(d). In conducting its de novo review, this court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statement by the appellant in his own behalf; and (7) the potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210; see also State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991). The burden is on the appellant to demonstrate the impropriety of his sentences. See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments.

Initially, we recognize that an appellant is eligible for alternative sentencing if the sentence actually imposed is eight years or less. See Tenn. Code Ann. § 40-35-303(a) (2003).[2] Moreover,

[2] Effective June 7, 2005, the legislature amended several provisions of the Criminal Sentencing Reform Act of 1989. However, the appellant committed the crime in this case before June 7, 2005, and he did not "elect to be sentenced under the provisions of the act by executing a waiver of his ex post facto protections." Tenn. Code Ann. § 40-35-114, Compiler's Notes. Therefore, the 2005 amendments do not affect the appellant's case, and we have cited the statutes that were in effect at the time the appellant committed the offense.

(continued...)

an appellant who is an especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing. See Tenn. Code Ann. § 40-35-102(6) (2003). In the instant case, the appellant is a Range I, standard offender convicted of a Class C felony; therefore, he is presumed to be a favorable candidate for alternative sentencing. However, this presumption may be rebutted by "evidence to the contrary." State v. Zeolia, 928 S.W.2d 457, 461 (Tenn. Crim. App. 1996). The following sentencing considerations, set forth in Tennessee Code Annotated section 40-35-103(1), may constitute "evidence to the contrary":

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

Zeolia, 928 S.W.2d at 461. Additionally, the principles of sentencing reflect that the sentence should be no greater than that deserved for the offense committed and should be the least severe measure necessary to achieve the purposes for which the sentence was imposed. See Tenn. Code Ann. § 40-35-103(2), (4). Further, the "potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed." Tenn. Code Ann. § 40-35-103(5).

As we have noted, the appellant's presentence report shows that he has numerous prior misdemeanor convictions, including prior convictions involving drugs and drug paraphernalia. Nothing indicates that he has sought treatment for his drug problem, and we agree with the trial court that the appellant's potential for rehabilitation weighs against alternative sentencing. We also agree that general deterrence is needed in this case. In its ruling, the trial court stated as follows:

> I find in this particular instance and this offense that a conviction of manufacturing methamphetamine is a very serious offense in our community. We have unprecedented numbers of people using, becoming addicted to, dying, having their children taken away because of the use and manufacture of methamphetamine.

In State v. Hooper, 29 S.W.3d 1, 10-12 (Tenn. 2000), our supreme court set out five factors for consideration when denying probation solely upon the basis of deterrence:

---

[2](...continued)

> (1) Whether other incidents of the charged offense are increasingly present in the community, jurisdiction, or in the state as a whole.
>
> . . . .
>
> (2) Whether the defendant's crime was the result of intentional, knowing, or reckless conduct or was otherwise motivated by a desire to profit or gain from the criminal behavior.
>
> . . . .
>
> (3) Whether the defendant's crime and conviction have received substantial publicity beyond that normally expected in the typical case.
>
> . . . .
>
> (4) Whether the defendant was a member of a criminal enterprise, or substantially encouraged or assisted others in achieving the criminal objective.
>
> . . . .
>
> (5) Whether the defendant has previously engaged in criminal conduct of the same type as the offense in question, irrespective of whether such conduct resulted in previous arrests or convictions.

In this case, the appellant's crime resulted from intentional behavior, and he had been making methamphetamine for six months before he was arrested. Moreover, he told officers that he had been assisting someone else in making the methamphetamine. Finally, Jerry Johns stated that he was supervising about ninety probationers in the district, that at least eight-five percent of them were on probation for methamphetamine-related crimes, and that other probation officers in the district also were supervising probationers convicted mostly of methamphetamine-related crimes. See id. at 11, 13 (stating that while a court's extrajudicial observations about deterrence should not be considered in sentencing, "someone with special knowledge of the level of a particular crime will generally be sufficient to establish the presence of this factor"). We believe these facts support a conclusion that a need for deterrence exists in this case and that the trial court properly denied the appellant's request for alternative sentencing.

III. Conclusion

Based upon the record and the parties' briefs, we reverse Starkey's conviction for insufficient evidence and dismiss that charge. McCoy's conviction for knowingly keeping or maintaining a dwelling that is used to keep or sell controlled substances is also reversed, and the case is remanded to the trial court for a new trial. McCoy's conviction and sentence for manufacturing methamphetamine are affirmed.

_____

NORMA McGEE OGLE, JUDGE